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No. 88-1023

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

KARL W. CHRISTEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. In the petition, we explained (Pet. 9-11) that the Internal Revenue Code explicitly addresses the question of the deductibility of personal expenses when incurred in a business-related context. Section 262 provides that, "[e]xcept as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." And the Code provides (see Sections 161, 261) that this prohibition takes precedence over the provisions of the Code that allow certain itemized deductions, such as the deduction for "ordinary and necessary" business expenses (Section 162(a)).

Expenses incurred for one's own meals, which are normally eaten in order to satisfy a person's physical need for sustenance, are the sort of expenses that ordinarily would be regarded as clearly "personal," and therefore within the

purview of the nondeductibility rule of Section 262. This does not mean that the cost of one's own meal is never deductible. Section 262 does not disallow the deduction of personal expenses, like meals, if a deduction is expressly provided elsewhere in the Code; for example, expenses for one's own meals incurred while traveling overnight away from home are deductible under Section 162(a)(2).[1] Moreover, as discussed in our petition (at 11, 16-17), there may be some unusual situations in which an apparently personal expense, such as the cost of one's meal, is so imbued with a business purpose as to overwhelm its character as a personal expense and therefore permit it to be deducted as a business expense under the general provisions of Section 162(a). For example, a person engaged in the business of reviewing restaurants could reasonably regard expenses for meals in restaurants under review as incurred for predominantly business purposes, rather than for nourishment. As this Court has stated, however, the general rule is that "the taxpayer whose business requires no travel [that would bring him within the reach of Section 162(a)(2)] cannot ordinarily deduct the cost of the lunch he eats away from home" (*United States* v. *Correll,* 389 U.S. 299, 302 n.7 (1967)).

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[1] The general provision of a deduction for ordinary and necessary business expenses in Section 162(a) cannot qualify as the "express" provision of a deduction for personal expenses within the meaning of Section 262. It is fundamental that, quite apart from Section 262, "a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms" (*New Colonial Ice Co.* v. *Helvering,* 292 U.S. 435, 440 (1934)). Thus, if every general provision for an itemized deduction fell within the exception to Section 262, the general prohibition on the deduction of personal expenses would be a nullity because it would not affect *any* otherwise deductible expenses. Rather, the exception stated in Section 262 refers only to provisions that clearly authorize the deduction of personal expenses, such as Section 162(a)(2) or Section 217 (see Pet. 11).

The court of appeals' decision in this case sharply diverges from this well-settled framework. The deduction of respondents' meal expenses concededly was not authorized by any express provision of the Code, such as Section 162(a)(2). Nor can it reasonably be said that the expenses were so imbued with a business purpose that they lost their character as personal expenses covered by Section 262. The sole purpose of the meals was to serve the quintessentially personal need of respondents for nourishment. The court of appeals suggested no purpose for the meal expenses other than sustenance, and it certainly made no attempt to demonstrate that the exigencies of respondents' business were such that these meals served a business, rather than a personal, purpose.[2] Instead, the court of appeals held that respondents are permitted to deduct their lunch expenses because their ability to eat their lunch freely was somewhat circumscribed for the convenience of their employer—specifically, by the requirements that they be on call and eat in roadside restaurants. That holding permits the deduction, as ordinary and necessary business expenses under Section 162(a), of what are undeniably personal expenses, and therefore it is inconsistent with

[2] Of course, it can be said that the satisfaction of troopers' need for sustenance advances the business interest of the Highway Patrol because the Patrol and the public are better served by well-nourished troopers, rather than ones who are weakened by having missed lunch. But Section 262 operates to make clear that no deduction is allowed for an expense that serves a business interest by means of satisfaction of an individual's personal needs (and thus might arguably be regarded as an ordinary and necessary business expense under Section 162(a) standing alone). In this respect, the meal expenses here are no different from commuting expenses or clothing expenses—or, for that matter, the expense of meals consumed at home. Obviously, an individual's business requires him to be present, to be clothed, and not to be incapacitated by malnutrition, but those expenses are personal expenses that are not deductible.

both the Code and a long line of lower court decisions (see Pet. 13-16).[3]

The decision below takes a narrow offshoot of the general rule that meal expenses are not deductible—the principle that what is ordinarily a personal expense can in some circumstances be so endowed with a business purpose that it is no longer a personal expense—and unacceptably ex-

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[3] The cases cited by respondent for the proposition that personal expenses routinely may be deducted under the general provision of Section 162(a) are inapposite. *Walraven* v. *Commissioner*, 815 F.2d 1246 (8th Cir. 1987) (Br. in Opp. 20), involved the general principle that a taxpayer who is temporarily living away from his tax home because of short-term employment may deduct certain expenses as traveling expenses under Section 162(a)(2). In *Ellwein* v. *United States*, 778 F.2d 506 (8th Cir. 1985) (Br. in Opp. 19), a deduction for commuting a long distance to a temporary job was authorized only because of special congressional action, not under Section 162(a). The theory of the deduction was that the expense is not "personal" because, unlike the typical commuting situation, the distance between the workplace and the taxpayer's home is not a matter of personal choice since it would not be feasible for the taxpayer to move closer to a temporary job. That theory, while first accepted by the IRS, was rejected by the Tax Court and subsequently by the IRS, and the deduction was allowed in *Ellwein* only because Congress enacted a transitional rule allowing the deduction. See generally 778 F.2d at 511 n.4; see also *Turner* v. *Commissioner*, 56 T.C. 27 (1971); Rev. Rul. 76-453, 1976-2 C.B. 86; Rev. Rul. 53-190, 1953-2 C.B. 303; Pub. L. No. 95-427, 92 Stat. 996 (1978). In *Inman* v. *Commissioner*, 29 T.C.M. (CCH) 1168 (1970) (Br. in Opp. 20), the court allowed the taxpayer to allocate a portion of his utility expenses as business expenses because they were incurred solely for business purposes, such as operating a short-wave radio for his employer; the remainder of the utility expenses were nondeductible personal expenses. There is no contention here that any portion of respondents' meal expenses were incurred for any reason other than respondents' personal sustenance. Nor is respondents' claim confined to the limited extra expense of purchasing two lunches on particular occasions, if any, when consumption of a paid-for first lunch has been prevented by a call to duty.

pands it into an exception that swallows the rule. As noted in the petition (at 13-16, 19), the decision below opens the door to a myriad of claims for the deduction of personal expenses on the theory of job-related restrictions. There are many people whose lunch options are limited because they must be available to address some job-related problem on short notice; like respondents here, they could arguably claim that their meals are subject to job-related restrictions and hence deductible as business expenses. Moreover, anyone required to wear a business suit at his place of employment can claim that the cost of his clothing is a business expense under the approach of the court below. Thus, certiorari is warranted here to prevent serious erosion of the rule against nondeductibility of personal expenses.

2. Respondents devote little effort to attempting to defend the correctness of the conclusion below that the Code authorizes them to deduct the expenses of daily meals incurred for the sole purpose of providing them with nourishment. Instead, the thrust of respondents' submission is to characterize the issue in this case as an entirely factual one on which the district court's decision must be affirmed unless clearly erroneous. Specifically, respondents contend that the district court's critical factual finding was that "[r]espondents were entitled to deduct the amounts of their meal expenses while on duty in 1981 and 1982, because they constituted 'ordinary and necessary' expenses under § 162(a)" (Br. in Opp. 23), and that it is inappropriate to grant certiorari to review the correctness of that factual finding. Respondents' characterization of the question presented and their related contentions are incorrect.

It is true, of course, that the determination whether a particular expense is a nondeductible personal expense "requires a factual inquiry" (Br. in Opp. 7). The facts ob-

viously must be established before any judgment can be made concerning their legal significance. And whether a particular expense is "ordinary" or "necessary" to a specific business in the circumstances of a particular case can be a factual question (see Br. in Opp. 15 n.8). But the issue presented in this case does not turn on the correctness of any such factual findings; on the contrary, the facts in this case are undisputed. Rather, the issue presented in this case concerns the correct legal framework within which those facts are to be considered in making the ultimate legal determination whether respondents' meal expenses are deductible.

There is no factual finding in this case that supports the proposition that respondents purchased meals for a business, rather than a personal, reason. The district court did find that the particular restaurants in which the meals were eaten were chosen for the "convenience and benefit of the Patrol" (Pet. App. 44a), but it did not question that the reason the meals were purchased was to satisfy respondents' personal need for sustenance. Thus, even if we assume arguendo that the court's findings would support the conclusion that the meals could be viewed as having some degree of business purpose that could justify their characterization as ordinary and necessary business expenses, Section 262 precludes the deduction of what remain essentially personal expenses. In short, only a fundamental legal error permitted the courts below to hold that, notwithstanding the specific prohibition of Section 262, meal expenses incurred for the personal reason of obtaining nourishment can be deducted under Section 162(a) as ordinary and necessary business expenses.[4]

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[4] Respondents, quoting one sentence from the government's court of appeals brief in *Moss* v. *Commissioner*, 758 F.2d 211 (7th Cir.), cert. denied, 474 U.S. 979 (1985), contend (Br. in Opp. 12 n.6) that the government has changed its position on whether the issue presented in

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this case is a legal or a factual one. This contention is mistaken. As we have explained, the inquiry into whether an expense is a nondeductible personal expense requires some fact finding, and it may yield a factual conclusion that a particular expense is "necessary" to a business or that it is incurred for personal, nonbusiness reasons; this element of the analysis is reflected in the quoted excerpt. The ultimate determination of deductibility, however, is a legal question. A more complete examination of the government's brief in *Moss* shows that the thrust of its argument there is consistent with the petition in this case; the government argued not for deference to the Tax Court on clearly erroneous grounds, but that the Tax Court's decision was legally correct because the meal expenses in that case were personal expenses that are rendered nondeductible by Section 262 (*Moss* C.A. Br. at 7, 10 (emphasis omitted)):

> An expense is for personal, rather than business reasons, if it is personal in character and would be incurred whether or not the taxpayer engaged in business activity. An expense for the taxpayer's own meals is presumptively a nondeductible personal expense. In the instant case, where deductions are sought in connection with expenses for daily sustenance, the record is devoid of any indication that taxpayer would not have incurred similar expenses had he declined to eat lunch with his colleagues. The fact that it was convenient for him to incur the expenses while working does not change the personal character of the expenditures.
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> * * * * *
>
> [T]he deduction disallowance provisions of Section 262 take precedence over the allowance provisions of Section 162.

To the extent the phrasing of the sentence quoted by respondent suggests that the clearly erroneous standard of review necessarily applies to the ultimate determination whether a particular expense is rendered nondeductible by Section 262, that suggestion is mistaken. We note, in any event, that even this mistaken view of the extent to which clearly erroneous review is appropriate would not help respondents because there is no factual finding here that the meal expenses were not personal; rather, the courts below committed legal error in holding that even clearly personal expenses may be deducted under Section 162(a).

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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